

plies to the payment of the sum of \$20,000 by the Respondent to D.W.2, as this question does not really arise in this case. Suffice here to say that if section 4 is applicable, it would only enable the Respondent to recover the sum from D.W.2. The Respondent did not really contravene section 4 and therefore did not commit an offence under section 5 of the Act. Obviously it was D.W.2 who required the payment of the sum of \$20,000 as consideration for the assignment of the tenancy, and if section 4 applies, it would be only D.W.2 who committed the offence under section 5. That, however, should not affect the tenancy acquired by the Respondent. The object of the rent control legislation is to protect a tenant and not to penalise him. In any event, as I said before, the Appellants in effect made a fresh grant of tenancy of the premises to the Respondent and such a grant was not vitiated or in any way affected by the payment made by the Respondent to D.W.2.

I therefore dismiss this appeal with costs.

Appeal dismissed.

Solicitors: Kirpal Singh & Co.; Choo & Yap

A MALAYSIAN REPORTS

HOTEL EQUATORIAL (M) SDN. BHD. v. NATIONAL UNION OF HOTEL, BAR & RESTAURANT WORKERS & ANOR.

B [F.C. (Lee Hun Hoe C.J. (Porneo), Seah & Syed Agil Barakbah F.JJ.) February 7 & March 24, 1984]
[Kuala Lumpur – Federal Court Civil Appeal No. 85 of 1983]

Industrial Law – Application to refer questions of law to the High Court – Jurisdiction of Industrial Court –
C *Function of High Court – Industrial Relations Act, 1967, s. 33A(1).*

In this case the Industrial Court had made an award binding the Hotel and the Union. Pursuant to section 33A (1) of the Industrial Relations Act, 1967, the Hotel applied for certain questions of law dealing with (a) service charge (b) outside catering allowance (c) union notice board and check-off and (d) non-statutory provisions to be referred to the High Court for determination. The application was dismissed by the Industrial Court. The Hotel then took the matter to the High Court by way of certiorari and mandamus proceedings in respect of questions (a), (b) and (c) only. After hearing legal arguments the learned Judge allowed the application relating to question (b) (i) and (b) (ii) and question (c) (i), (ii) and (iii) but dismissed the application relating to question (a) (i), (ii) and (iii). The Hotel appealed to the Federal Court. There was no cross-appeal by the Union.

Held: (1) the discretion conferred on the Industrial Court is not an unfettered discretion but a limited one and in the exercise of its discretion the Industrial Court must have regard to the four paragraphs enumerated in section 33A (1) of the Industrial Relations Act;

(2) in rejecting the application relating to question (a) (i) the Industrial Court has misconceived its functions under section 33A (i) of the Act, has failed to consider the question submitted to it and has asked itself the wrong question. It follows that the Industrial Court rejected question (a) (i) on grounds which it has no right to take into account and that its decision was a nullity;

(3) in dismissing the application relating to question (a) (ii) the Industrial Court purported to adjudicate on the question which it has no power to do under section 33A (1) of the Act. It follows that the Industrial Court acted in excess of the limits of its jurisdiction or in the absence of jurisdiction and that its decision was a nullity;

(4) it is quite plain that in this case the Industrial Court has not determined the question (a) (iii) which it is required to determine under section 33A (1) of the Act. It follows that the decision of the Industrial Court was a nullity;

I (5) in this case the learned judge of the High Court appears to have misconceived his duty or function when he purported to substitute his own reason for that of the Industrial Court;

(6) in this case the decision of the Industrial Court relating to question (a) (i), (ii) and (iii) must be quashed and an order of mandamus issued to direct the Industrial

Court to hear and determine question (a) (i), (ii) and (iii) in accordance with the provisions of section 33A (1) of the Industrial Relations Act, 1967.

Cases referred to:

- (1) *Anisminic Ltd. v. Foreign Compensation Commission* [1969] 2 A.C. 147.
- (2) *South-East Asia Fire Bricks Sdn. Bhd. v. Non-Metallic Mineral Products Manufacturing Employees Union & Ors.* [1980] 2 M.L.J. 165.
- (3) *Rex v. Shoreditch Assessment Committee, ex parte Morgan* [1910] 2 K.B. 859.
- (4) *Board of Education v. Rice* [1911] A.C. 179.
- (5) *Estate & Trust Agencies (1927) Ltd. v. Singapore Improvement Trust* [1937] A.C. 898; [1937] M.L.J. 155.
- (6) *Maradana Mosque Trustees v. Mahmud* [1967] 1 A.C. 13.
- (7) *R. v. Board of Education* [1909] 2 K.B. 1045.
- (8) *Rex v. Nat Bell Liquors Ltd.* [1922] 2 A.C. 128.
- (9) *R. v. Licensing Justices of Kingston-on-Thames* (1901-02) 18 T.L.R. 477.

HIGH COURT.

C.V. Das (*V. Chandran* with him) for the applicant.

D.P. Xavier for the respondents.

Cur. Adv. Vult.

Wan Hamzah J.: A trade dispute arose between Hotel Equatorial (M) Sdn. Bhd. and the National Union of Hotel, Bar and Restaurant Workers, and it was referred by the Minister under section 26(2) of the Industrial Relations Act to the Industrial Court for determination. The Industrial Court heard the dispute and made an award on January 30, 1982 i.e. Award No. 14/82. Subsequently Hotel Equatorial (M) Sdn. Bhd. (hereafter referred to as the Company) applied to the Industrial Court under section 33A(1) to refer to the High Court certain questions of law which, it alleged, arose in the course of the proceedings before the Industrial Court. On May 5, 1982 the Industrial Court dismissed the application. The order dismissing the application is called Award No. 88/82. Consequently the Company applied to the High Court for an order of certiorari to remove into the High Court for the purpose of being quashed the Industrial Court's decision to dismiss the application. The Company also applied for an order of mandamus to direct the Industrial Court to refer the questions of law to the High Court. It is not disputed by the parties that all the questions which the Company has asked the Industrial Court to refer to the High Court were raised and argued before the Industrial Court at the hearing leading to the making of Award No. 14/82. The parties must have argued the questions in substance although not exactly in the present form.

A Section 33B(1) of the Act provides as follows:—

"Subject to this Act and the provisions of section 33A, an award, decision or order of the Industrial Court under this Act [including the decision whether to grant or not to grant an application under section 33A(1)] shall be final and conclusive, and shall not be challenged, appealed against, reviewed, quashed or called in question in any court."

B The decision of the House of Lords in *Anisminic Ltd. v. Foreign Compensation Commission*⁽¹⁾ shows that, when words in a statute oust the power of the High Court to review decisions of any inferior tribunal by certiorari, they will not have the effect of ousting that power if the inferior tribunal has acted without jurisdiction or if it has done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity. A decision on any question would be a nullity if the tribunal in making the decision failed to consider any matter which the law requires it to take into consideration in determining the question. Section 33A(1) of the Act provides:—

E "Where the (Industrial) Court has made an award under section 30(1) it may, in its discretion, on the application of any party to the proceedings in which the award was made, refer to the High Court a question of law —

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- (a) which arose in the course of the proceedings;
 - (b) The determination of which by the (Industrial) Court has affected the award;
 - (c) which in the opinion of the (Industrial) Court, is of sufficient importance to merit such reference; and
 - (d) the determination of which by the (Industrial) Court raises, in the opinion of the (Industrial) Court, sufficient doubt to merit such reference."

G Therefore in order to determine whether or not to refer a question of law to the High Court the Industrial Court should consider and determine —

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- (a) whether the question of law arose in the course of the proceedings;
 - (b) whether the determination of the question of law by the Industrial Court has affected the award;
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- (c) whether in the opinion of the Industrial Court the question of law is of sufficient importance to merit reference to the High Court; and
 - (d) whether the determination of the question of law by the Industrial Court raises, in its opinion, sufficient doubt to merit such reference.

If a question of law is not of a kind stated in section 33A(1)(a), (b), (c) and (d), it does not qualify for reference and it should not be referred to the High Court. A question of law should be referred only if it qualifies for reference under that section. If in respect of any particular question of law the Industrial Court without considering any of the matters in items (a), (b), (c) and (d) above decided to refer it or decided not to refer it, the decision would be a nullity and should be quashed on the ground that the Industrial Court had failed to consider a matter which is required by law to be taken into consideration. If in deciding whether to refer a question of law the Industrial Court took into consideration a matter which the law does not require to be considered, and was influenced by that consideration into making its decision, the decision would be a nullity and should be quashed.

As to the item (c), whether in the opinion of the Industrial Court the question of law is of such sufficient importance to merit reference to the High Court, in my opinion some guidance can be taken from the judgment of the Privy Council in *South-East Asia Fire Bricks Sdn. Bhd. v. Non-Metallic Mineral Products Manufacturers Employees Union & Others*⁽²⁾. The following is the relevant passage in that judgment:—

"The reason for keeping questions remitted to the Industrial Court away from the ordinary courts may be that its functions are not purely judicial. For example, the Industrial Court is directed by Section 27(4) [now Section 30(4)] of the Act of 1967, in making its award in respect of trade dispute, to have regard to *inter alia* "the financial implication and effect of such award on the economy of the country, and on the industry concerned" and by subsection (5) to "act according to equity, good conscience and the substantial merit of the case without regard to technicalities and legal form"."

In view of what is stated by the Privy Council in the above passage I am of the opinion that in proper cases the Industrial Court in making an award may disregard a certain question of law which arose (other than a question of law relating to its jurisdiction) if in its opinion other relevant considerations outweigh the consideration of that question of law. When a question of law was disregarded on that ground, it became a question of law which the Industrial Court can properly classify as a question of law which is not of sufficient importance to merit reference to the High Court.

Service Charge

The first set of questions of law which the Company has asked the Industrial Court to refer

A to the High Court relate to a matter in dispute on which the Industrial Court had made the following decision in Award No. 14/82:—

B The Company shall retain 10% of the service charge collected monthly and shall distribute the remaining 90% to all employees as prescribed in Appendix C. The distribution of service points should be left to the Union.

The questions of law which the Company has asked the Industrial Court to refer to the High Court are as follows:—

- C (i) Whether, having regard to the nature and character of service charges in law and also to the provisions of the Industrial Relations Act, the Industrial Court was correct in law in limiting its distribution to only those employees listed in Appendix C.
- (ii) Whether, having regard to the nature of service charges and also to the provisions of the Industrial Relations Act, it is correct in law for the Industrial Court to abdicate jurisdiction or decline jurisdiction of service points amongst the employees concerned.
- D (iii) Whether it is correct in law for the Industrial Court to leave the question of distribution of service points entirely to the Union especially where there are many employees who are not members of the Union and thus not represented by it.

E In connection with service charge the Industrial Court stated, *inter alia*, as follows in Award No. 14/82:—

- F "The company urged us not to make any changes to the existing system. ... we have no hesitation in making a change here, because there is a good reason to make such a change — a change to conform with uniformity in the hotel industry and a change to maintain stability ... In the instant case, the Union has devised a system of distribution of service points to its members working in the Hotel — a system which it considered fair and equitable and it will not be right for either the Hotel management or this Court to interfere. If the system of distribution is to be applied universally throughout the hotel industry, we do not see how it can affect the recruitment of new employees, for each new employee whether he be employed in Hotel A, B or C, will receive the same service points at the outset. If the system is adopted and properly implemented, it might in the end produce a stable work in the hotel industry."
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I I am not considering whether the decision of the Industrial Court in Award No. 14/82 was right because that consideration is not relevant for the present purpose (i.e. the purpose of determining whether the Industrial Court should refer the questions of law to the High Court). But it appears to me that when making its decision on service charge in Award No. 14/82, foremost in the mind of the Industrial Court was stability in the hotel industry which, it believed, can be maintained by uniformi-

ty. This consideration of stability and uniformity seems to outweigh all other considerations in the mind of the Industrial Court including consideration of the questions of law posed. In my view this is permissible and in accordance with the judgment of the Privy Council in *South-East Asia Fire Bricks Sdn. Bhd. v. Non-Metallic Mineral Products Manufacturers Employees Union & Ors.* (*supra*) of which the relevant part is quoted above. In view of the great importance which the industrial Court placed on stability and uniformity in the hotel industry, it seems that the Industrial Court considers the questions of law not of sufficient importance in the consideration of the dispute and hence not of sufficient importance to merit reference to the High Court, although the Industrial Court did not state so in so clear words. Therefore I hold that it was not wrong for the Industrial Court to refuse to refer the questions to the High Court.

In Award No. 88/82 the Industrial Court denied that it abdicated or declined jurisdiction, and it gave the following explanation of what it meant when it ordered in Award No. 14/82 that the distribution of service points should be left to the Union:—

“The (Industrial) Court was merely overstating its agreement with the views of the Union. The (Industrial) Court referred to Award No. 37/81 which emphasised the requirement of mutual consent in the distribution of service charge points. That Award is not an authority of the proposition that the distribution of service charge points should be left to the Union ...”

From the statement of the Industrial Court in Award No. 14/82 which is quoted above, it appears to me that the Industrial Court did have a look at the system of distribution of service charge points devised by the Union and found it acceptable, and it is therefore not quite correct to say that the Industrial Court had declined jurisdiction. This seems to be another factor which supports the view that the questions are not of sufficient importance to merit reference to the High Court.

Outside Catering Allowance

Another set of questions of law which the Company has asked the Industrial Court to refer to the High Court related to the dispute on outside catering allowance, on which the Industrial Court made the following decisions in Award No. 14/82:—

- (a) In addition to his normal pay, an employee performing outside catering shall be paid \$18 per occasion if it is within the Federal Territory and State of Selangor.

- A (b) For catering outside the Federal Territory and State of Selangor, the employees shall be entitled to an allowance of \$30 per occasion.
- (c) An employee who works in excess of 8 hours during outside catering shall be paid according to Article 8 or 19, whichever is applicable to the occasion.

B The following are the questions of law which the Company has asked the Industrial Court to refer to the High Court:—

- (i) Whether in the light of Section 13(3)(f) of the Industrial Relations Act it is justified for the Industrial Court to order special remuneration for employees who undertake assignments compatible or consistent with the terms of their employment.

- (ii) Whether it is justified in industrial law for the Industrial Court to order payment of allowance for discharge of a task which is an integral part of the hotel business and an indivisible part of the employee's nature of employment.

D Section 13(3) (f) of the Industrial Relations Act reads as follows:—

13(3) Notwithstanding subsection (1), no trade union of workmen may include in its proposals for a collective agreement a proposal in relation to any of the following matters, that is to say —

- (f) the assignment or allocation by an employer of duties or specific task to a workman that are consistent or compatible with the terms of his employment.

F Relating to the above questions posed by the Company the Industrial Court states, *inter alia*, as follows in Award No. 88/82:—

“Under the agreements no allowance was payable. The Company says it should not now be ordered to be paid as the employees concerned are doing the same job whether outside or inside the Hotel. Further, the Company contends that this provision offends against section 13(3)(f) of the Industrial Relations Act. We do not agree. That subsection merely gives the right to employers to assign duties or allocate specific tasks to their workers that are consistent or compatible with the terms of their employment. There is nothing in this provision to prevent the parties from negotiating the rates to be paid when employees are made to perform such duties or tasks ... We find no question of law arises ... to be referred to the High Court ...”

The Industrial Court's interpretation of Section 13(3)(f) may be correct, but whether its interpretation is correct is not relevant for the present purpose. It is difficult to follow the Industrial Court's statement that it finds no question of law arises, whereas earlier it had stated that the Company had invoked section 13(3)(f). I am inclined to believe that what the Industrial Court meant is that in its interpretation of the section, the section does not apply. But the Industrial Court's

own interpretation of the section is not relevant for the purpose of deciding whether the question should be referred to the High Court or not. If the Industrial Court had stated in Award No. 88/82 in its opinion the questions of law posed by the Company are not of sufficient importance to merit reference to the High Court (for example, because other considerations outweigh the consideration of the questions of law), the position would be different and the Industrial Court would be justified in refusing to refer the questions. I order that the Industrial Court's decision not to refer to High Court the two questions of law posed by the Company in connection with outside catering allowance be quashed, on the ground that it does not appear from the record that the Industrial Court had considered whether in its opinion the questions were of sufficient importance to merit reference and on the ground that in making its decision not to refer the Industrial Court had been influenced by its consideration of an irrelevant matter, and hence its decision not to refer is a nullity. In the absence of anything to the contrary in the record before the Court I hold that the Industrial Court ought to have found the questions of law of sufficient importance, and determination of the questions raises sufficient doubt, to merit reference. Therefore I further order that the questions be referred to the High Court.

Union Notice Board Check-Off

Another set of questions which the Company has asked the Industrial Court to refer to the High Court relate to some matters in dispute on which the Industrial Court had made the following decisions in Award No. 14/82:—

Union Notice Board: The Company shall provide a Union notice board of 24" x 36" for the use of the Union.

Check-Off: The Company shall remit to the Union monthly subscription deducted from Union members who have authorised the Company to do so, provided that:

- (i) The authorisation letter shall specifically stipulate the monthly subscription rate and in the event of the rate being increased or decreased, a fresh authorisation letter for deduction must be made.
- (ii) Nothing shall preclude the employee from withdrawing his consent by serving the Company seven calendar days notice.

The following are the questions which the Company has asked the Industrial Court to refer to the High Court:—

- (i) Whether the Industrial Court has jurisdiction to im-

- A pose the provisions of a union notice board and check-off in the collective agreement in the light of these matters not being a "trade dispute" within the meaning of section 2.
- (ii) Whether the Industrial Court is justified in law in relying on the provision of these matters in the previous collective agreement between the parties in the face of objection by the employer for its inclusion in the present agreement.
- B (iii) Whether the Industrial Court erred in law by not observing its own stated guideline in rendering its award herein viz. the need for uniformity per the Hilton Award, in that the Hilton award did away with check-off in the subsequent agreement notwithstanding its presence in the previous agreement, whereas the Industrial Court here in directing compulsory provision of check-off went against the stated guideline.
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In Award No. 88/82 the Industrial Court states that the ground for dismissing the application for reference is that the matters do not raise any question of law for reference to the High Court. This seems to be contrary to what the Industrial Court has stated earlier in Award No. 88/82 on the same matters. It has earlier stated:

- E "... what is capable of being included in a collective agreement should also be capable of inclusion in an award. Now, section 2 of the Industrial Act, defines 'collective agreement' to include matters concerning relations between such parties (employer and trade union of workmen). The preamble to the Act states: 'An Act to provide for the regulation of the relations between employers and workmen and their trade unions and the prevention and settlement of any differences or disputes arising from their relationship and generally to deal with trade disputes and matters arising therefrom.' We hold that these provisions of the law mean that a collective agreement (or in lieu thereof an award of the Court) may contain provisions in respect of two main subject-matters viz: (a) concerning relations between the employer and the trade union; and (b) terms and conditions of employment."
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Therefore it is clear that in trying to justify its decision in Award No. 14/82 on the dispute relating to Union notice board and check-off the Industrial Court relies heavily on its interpretation of the statutory provisions of the law referred to in the above passage. This shows that the answers to the questions posed by the Company involve the consideration of the law and therefore they are questions of law. The Industrial Court's decision in Award No. 14/82 may be correct having regard to the law, but right now it is not relevant to consider whether the decision in Award No. 14/82 was correct or not. In Award No. 88/82 the Industrial Court has not stated that it had considered whether the questions posed by the Company are of sufficient importance to merit reference to the High Court. For the reasons which

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I have stated it is clear that they are questions of law which arose in the course of the proceedings. It is also clear from the above passage extracted from Award No. 88/82 that the determination of the questions by the Industrial Court had affected the award (Award No. 14/82). I order that the decision of the Industrial Court not to refer the questions be quashed on the ground that the decision was a nullity for the reason that in making the decision it had not considered a matter which it should. In the absence of anything to the contrary in the record before this Court I hold that the Industrial Court ought to have found the questions of law of sufficient importance, and determination of the questions raises sufficient doubt, to merit reference. Therefore I further order that the questions be referred to the High Court.

The Industrial Court should send the record of its proceedings to the Registrar of the High Court. Question of cost is reserved for further argument on an appropriate date to be fixed.

The applicants appealed to the Federal Court against the above Judgment.

FEDERAL COURT.

C. V. Dass (*V. Chandran* with him) for the applicants.

D. P. Xavier for the first respondents.

Cur. Adv. Vult.

Seah F.J. (delivering the Judgment of the Court): On January 30, 1982 the Industrial Court made an Award No. 14/82 under section 30(1) of the Industrial Relations Act 1967 (hereinafter referred to as the Act) binding Hotel Equatorial (M) Sdn. Bhd. (hereinafter called the Hotel) and National Union of Hotel, Bar & Restaurant Workers (hereinafter called the union) and its members. Pursuant to section 33A(1) of the Act the Hotel applied for certain questions of law dealing with (a) service charge, (b) outside catering allowance, (c) union notice board & check-off and (d) non-statutory provisions to be referred to the High Court for determination. The application was dismissed by the Industrial Court on May 5, 1982 vide Award No. 88/82. The Hotel then took the matter to the High Court by way of certiorari and mandamus proceedings in respect of questions (a), (b) and (c) only. After hearing legal arguments the learned Judge allowed the application relating to question (b)(i) and (ii) and question (c)(i), (ii) and (iii) but dismissed the application relating to question (a)(i), (ii) and (iii). Hence the application by the Hotel to the Federal Court. There is no cross-appeal by the Union against the decision of

A the High Court. We will confine this appeal only to question (a) (i), (ii) and (iii) relating to service charge.

Section 33A(1) of the Act reads as follows:

B "Where the Court (Industrial) has made an award under section 30(1) it may, in its discretion, on the application of any party to the proceedings in which the award was made, refer to the High Court a question of law —

- (a) which arose in the course of the proceedings;
- (b) the determination of which by the Court has affected the award;
- C (c) which, in the opinion of the Court, is of sufficient importance to merit such reference; and
- (d) the determination of which by the Court raises, in the opinion of the Court, sufficient doubt to merit such reference."

D It is plain that the discretion conferred on the Industrial Court is not an unfettered discretion but a limited one and in the exercise of its discretion, the Industrial Court must have regard to the four paragraphs enumerated therein.

Now, section 33B(1) of the Act provides, *inter alia*, that "the decision of the (Industrial) Court to grant or not to grant an application under section 33A(1) shall be final and conclusive, and shall not be challenged, appealed against, reviewed, quashed or called in question in any court". It is common ground that such a clause will not have the effect of ousting the inherent supervisory power of the High Court to quash the decision by certiorari proceedings if the Industrial Court has acted without jurisdiction or in excess of the limits of its jurisdiction or if it has done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity. Authority for such a proposition is the Privy Council decision of the case of *South East Asia Fire Bricks Sdn. Bhd. v. Non-Metallic Mineral Products Manufacturers Employees Union & Ors.*⁽²⁾ and the House of Lords case of *Anisminic Ltd. v. Foreign Compensation Commission*⁽¹⁾. At page 195 Lord Pearce said:

I "Lack of jurisdiction may arise in various ways. There may be an absence of those formalities or things which are conditions precedent to the tribunal having any jurisdiction to embark on an inquiry. Or the tribunal may at the end make an order that it has no jurisdiction to make. Or in the intervening stage, while engaged in a proper inquiry, the tribunal may depart from the rules of natural justice; or it may ask itself the wrong questions; or it may take into account matters which it was not directed to take into account. Thereby it would step outside its jurisdiction. It would turn its inquiry into something not directed by Parliament and fail to make the inquiry which Parliament did direct. Any of these things would cause its purported decision to be a nullity."

And at page 171 Lord Reid said:

"It has sometimes been said that it is only where a tribunal acts without jurisdiction that its decision is a nullity. But in such cases the word "jurisdiction" has been used in a very wide sense, and I have come to the conclusion that it is better not to use the term except in the narrow and original sense of the tribunal being entitled to enter on the inquiry in question. But there are many cases where, although the tribunal had jurisdiction to enter on the inquiry, it has done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it had no power to make. It may have failed in the course of the inquiry to comply with the requirements of natural justice. It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it and decided some question which was not remitted to it. It may have refused to take into account something which it was required to take into account. Or it may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account. I do not intend this list to be exhaustive. But if it decides a question remitted to it for decision without committing any of these errors it is as much entitled to decide that question wrongly as it is to decide it rightly."

In Award No. 14/82 the decision of the Industrial Court on service charge may be summarised thus:

The Hotel shall retain 10% of the service charge collected monthly and shall distribute the remaining 90% to all the employees as prescribed in Appendix 'C'. The distribution of service points should be left to the Union.

We turn now to examine the reasons given by the Industrial Court for refusing to refer question (a)(i), (ii) and (iii) to the High Court. Question (a)(i) reads as follows:

Whether, having regard to the nature and character of service charges in law and also the provisions of the Industrial Relations Act, the Industrial Court was correct in law in limiting its distribution to only those employees listed in Appendix 'C'.

The Industrial Court dealt with this particular question in this manner and we quote:

"The Company says that the Award is discriminatory in that it excludes 51 categories of employees of the Hotel from a share of the service charge. An Award on terms and conditions of employment is in fact in lieu of a collective agreement. It follows that the employees bound by an Award could only be employees who could be bound by a collective agreement. Section 9 of the Act excludes employees in managerial, executive, confidential and security capacities. The 51 categories of employees excluded by the Award belong to the Section 9 categories. As the exclusion is by law it cannot be said to be discriminatory. It may, well be that it is desirable in the interests of productivity that the excluded employees be given incentives but that is

A not the concern of a collective agreement or award in lieu thereof. Be that as it may, we find that the question of discrimination did not arise during the course of the proceedings and we accordingly dismiss the application to refer Question (a)(i) to the High Court."

B It is quite plain that the Industrial Court has misconceived its functions under section 33A(1) of the Act and in *Rex v. Shoreditch Assessment Committee, Ex Parte Morgan*⁽³⁾ the Court of Appeal issued a mandamus because the committee had misconceived its duties. Farwell L.J. said at page 880.

C "No tribunal of inferior jurisdiction can by its own decision finally decide on the question of the existence or extent of such jurisdiction: such question is always subject to review by the High Court, which does not permit the inferior tribunal either to usurp a jurisdiction which it does not possess, whether at all or to the extent claimed, or to refuse to exercise a jurisdiction which it has and ought to exercise. Subjection in this respect to the High Court is a necessary and inseparable incident to all tribunals of limited jurisdiction; for the existence of the limit necessitates an authority to determine and enforce it: it is a contradiction in terms to create a tribunal with limited jurisdiction and unlimited power to determine such limit at its own will and pleasure – such a tribunal would be autocratic, not limited – and it is immaterial whether the decision of the inferior tribunal on the question of the existence or non-existence of its own jurisdiction is founded on law or fact."

F It is also quite plain that the Industrial Court has failed to consider the question submitted to it and in *Board of Education v. Rice*⁽⁴⁾ the House of Lords quashed the Board's decision and issued a mandamus on the ground that it had not determined the question committed to it by Parliament and at page 182 Lord Loreburn L.C. said:

G "The board is in the nature of the arbitral tribunal, and a court of law has no jurisdiction to hear appeals from the determination either upon law or upon fact. But if the court is satisfied either that the board have not acted judicially in the way I have described, or have not determined the question which they are required by the Act to determine, then there is a remedy by mandamus and certiorari."

I Lastly, it is also quite plain that the Industrial Court has asked the wrong question when it dismissed the application to refer question (a)(i) to the High Court. In *Estate & Trust Agencies (1927) Ltd. v. Singapore Improvement Trust*⁽⁵⁾ the Privy Council issued a writ of prohibition holding that a housing authority had made a declaration beyond its statutory powers because it had in effect asked itself the wrong question. At page 917 their Lordships said:

"In other words, the respondents were applying a wrong and an inadmissible test in making the declaration and in deciding to subject it to the Governor in Council. They were therefore acting beyond their powers, and the declaration is not enforceable."

And in the case of *Maradana Mosque*⁽⁶⁾ the Privy Council held that the Minister of Education in Ceylon acted without or in excess of jurisdiction in that he asked himself the wrong question in deciding whether or not to make the order.

It follows that the Industrial Court rejected question (a)(i) on grounds which it had no right to take into account and that its decision was a nullity.

The second set of question (a)(ii) reads:

Whether, having regard to the nature of service charges and also to the provisions of Industrial Relations Act, it is correct in law for the Industrial Court to abdicate jurisdiction or decline jurisdiction or decline to decide the distribution of service points amongst the employees concerned.

Dealing with this question the Industrial Court said:

"The Company says that the Court did not arbitrate in this case but instead either abdicated or declined jurisdiction when it said:

"We agree with the Union that the distribution of service points is best left to the Union ..."

And later

"In the instant case, the Union has devised a system of distribution of service points to its members working in the Hotel — a system which it considered fair and equitable and it will not be right for either the Hotel management or this Court to interfere."

In our opinion, the Court was merely overstating its agreement with the views of the Union. The Court referred to Award No. 37/82 which emphasised the requirement of *mutual consent* in the distribution of service charge points. That Award is not an authority for the proposition that the distribution of service charge points should be left to the Union. Here, the Court was expressing the view that as the Union has a vested interest in keeping all its members happy it will not do anything to provoke the wrath of one section to please another and therefore, it was a reliable guide to accept the Union's proposals. We are satisfied that the Court in the present case did consider the arguments of both sides and came to an independent decision. We are further satisfied that it did not abdicate or decline jurisdiction."

In so holding the Industrial Court purported to adjudicate on the question which it has no power to do under the provisions of section 33A(1) of

A the Act. It follows that the Industrial Court acted in excess of the limits of its jurisdiction or in the absence of jurisdiction and that its decision was a nullity.

Question (a)(iii) is in the following term:

B Whether it is correct in law for the Industrial Court to leave the question of distribution of service points entirely to the Union especially where there are many employees who are not members of the Union and thus not represented by it.

C This is what the Industrial Court has to say on the question:

"In practical terms, no employee under the Award loses anything or takes home less income as all the employees have reached the maximum points. But new employees will not get as much as their predecessors. If the Company finds that this change has really affected their recruitment plans, then they should negotiate with the Union to vary the Award. We find that except for the extended graduated scheme of distribution of the employees' share of the service charge, the Award on service charge is consistent with the current practice in the hotel industry. For the reasons we have stated we HOLD that no question of law arises for reference to the High Court in respect of Questions Nos. (a)(ii) & (iii) and we accordingly DISMISS this part of the application."

In rejecting the application the Industrial Court seems to have taken the view that since the award on service charge is consistent with the current practice in the hotel industry no question of law arises for reference to the High Court. As Lord Alverstone C.J. said at page 1061 in the case of *R v. Board of Education*⁽⁷⁾ which was cited by Lord Pearce in *Anisminic case (supra)* at page 197:

G "they (Board of Education) have not only not decided the question submitted to them, but have raised and made an order upon a matter never submitted to them ... or, in other words, they have given themselves jurisdiction to determine the question in favour of the local authority by changing the question submitted to them into the one which we have quoted."

H It is quite plain therefore that the Industrial Court has not determined the question (a)(iii) which it is required to determine under section 33A(1) of the Act. It follows that the decision of the Industrial Court was a nullity.

I In the High Court the learned Judge appeared to have disposed of Question (a)(i) and (iii) in this way:

"... In view of the great importance which the Industrial Court placed on stability and uniformity in the hotel industry, it seems that the Industrial Court considers the

questions of law not of sufficient importance in the consideration of the dispute and hence not of sufficient importance to merit reference to the High Court although the Industrial Court did not state so in so many words. Therefore I hold that it was not wrong for the Industrial Court to refuse to refer the question to the High Court."

With regard to Question (a)(ii) this is how the learned Judge dealt with the matter and we quote:

"... it appears to me that the Industrial Court did have a look at the system of distribution of service points devised by the Union and found it acceptable, and it is therefore not quite correct to say that the Industrial Court had declined jurisdiction. This seems to be another factor which supports the view that the questions are not of sufficient importance to merit reference to the High Court."

With respect to the learned Judge of the High Court, that was not the reason given by the Industrial Court is dismissing the application to refer question (a)(i), (ii) and (iii) to the High Court. If that were the real reason the Industrial Court would have said so in plain language.

We do not think that a proper approach had been adopted by the learned Judge of the High Court in dealing with the matter before him. In the exercise of its inherent supervisory jurisdiction over inferior tribunal of limited jurisdiction the High Court must always remember that it is not sitting as a Court of Appeal to review the findings of the inferior tribunals. The High Court, it must be observed, has no jurisdiction to consider the merits of the case; its only function is to consider whether the inferior tribunal has performed its duties according to law. A clear distinction must be maintained between want of jurisdiction and the manner of its exercise, otherwise review for jurisdictional error will be equivalent to review on merit. Speaking of the inherent supervisory jurisdiction of the superior court or High Court, Lord Sumner in the case of *Rex v. Nat Bell Liquors Ltd.*⁽⁸⁾ said at page 156:

"That supervision goes to two points: one is the area of the inferior jurisdiction and the qualifications and conditions of its exercise; the other is the observance of the law in the course of its exercise."

In our judgment, the learned Judge of the High Court appears to have misconceived his duty or function when he purported to substitute his own reason for that of the Industrial Court. This, with respect, he is not entitled to do. He has no power to alter or amend the grounds of decision of the Industrial Court in the exercise of its inherent supervisory jurisdiction and was wrong in law to do so.

A Since we have ruled that the decision of the Industrial Court dated May 5, 1982 relating to question (a)(i), (ii) and (iii) was a nullity within the principle enunciated in *South East Asia Fire Bricks case (supra)* and *Anisminic case (supra)* we hereby quash it. We also set aside that portion of the judgment of the High Court dealing with the same matter.

Next, it was submitted by learned counsel for the Hotel that an order of mandamus should be issued directing the Industrial Court to refer the said question of law to the High Court for determination under section 33A(1) of the Act. In our opinion, it is clear that we cannot grant an order of mandamus in that form inasmuch as it is rather unusual for the superior court to direct an act to be done in a particular manner unless the act is purely a ministerial act [Lord Alverstone C.J. in *R v. Licensing Justices on Kingston-on-Thames*⁽⁹⁾]. In this case, the Industrial Court is given a discretion albeit limited, whether or not to refer the question of law to the High Court and it is not right that the term of the order of mandamus should be in the form suggested by the learned counsel which has the effect of depriving the Industrial Court in the exercise of its discretion. In our judgment, the proper form of the order of mandamus would be to direct the Industrial Court to hear and determine question (a)(i), (ii) and (iii) in accordance with the provisions of section 33A(1) of the Industrial Relations Act 1967, and we so order.

There is one other matter which we would like to dispose of now. At the High Court the learned Judge referred to a passage in the judgment of the Privy Council in *South East Asia Fire Brick case* which reads:

"The reason for keeping questions remitted to the Industrial Court away from the ordinary courts may be that its functions are not purely judicial. For example, the Industrial Court is directed by Section 27(4) [now section 30(4)] of the Act 1967, in making its award in respect of trade dispute, to have regard to *inter alia* "the financial implication and effect of such award on the economy of the country, and on the industry concerned" and by sub-section (5) to "act according to equity, good conscience and the substantial merit of the case without regard to technicalities and legal form."

The learned Judge seems to think that this passage may be relevant when the Industrial Court is considering para (c) of section 33A(1) of the Act. It seems to us that the learned Judge has misapprehended the functions of the Industrial Court.

Under this section the Industrial Court is not asked to deal with the question of law but to exercise its discretion whether or not to refer certain questions of law to the High Court for a determination. Since the Industrial Court is not making an award under section 33A(1) it follows that sub-sections (4) and (5) of section 30 would not be germane to the matter in question and must therefore disregard these irrelevant collateral matters. In our judgment, the passage cited by the learned Judge is not relevant for the purpose of para (c) of section 33A(1) of the Act. Parliament has conferred a discretion on the Industrial Court to be used to promote the policy and objects of the Industrial Relations Act 1967.

The appeal is therefore allowed with costs here and in the High Court below to be taxed. The deposit should be refunded to the appellant.

Appeal allowed.

Solicitors: *Shook Lin & Bok; D.P. Xavier & Co.*

**DATIN HAJJAH ZALEHA & ORS. v.
PERKASA TRADING SDN. BHD. & ANOR.**

[O.C.J. (Wan Mohamed J.) April 9, 1983]
[Kota Kinabalu — Originating Summons No. K.129 of 1981]

Company Law — Company winding-up — Disposal of land after commencement of winding-up proceeding null and void — Companies Act, 1965, ss. 223 & 293 — Bankruptcy Act, 1967, s.53

In this case the winding-up of Taulani Sdn. Bhd. (the company) commenced on June 12, 1978. The company, as transferor, and the plaintiff and 3 others, as transferees, executed the Memorandum of Transfer on July 5, 1979. It was presented for registration on July 9, 1979. The High Court held that the disposition of the land (the property of the company) was void *ab initio* under section 223 of the Companies Act 1965 and ordered that the registration of transfer be cancelled.

The plaintiffs applied for an order to set aside the said Order of Court.

The Asst. Official Assignee as Official Receiver and Provisional Liquidator for the 2nd Defendant submitted, *inter alia*, that even if the date of the execution of the Sale and Purchase Agreement was taken to be the date of disposition of the said land, it was well within 6 months immediately before the commencement of the winding-up proceedings and therefore caught by section 293 of the Companies Act 1965.

A Held, dismissing the plaintiffs' application: even if the date of executing the Sale and Purchase Agreement (April 24, 1978) was taken to be the date of disposal of the land, the disposal or the transfer of the said land by the company was void by virtue of section 293 of the Companies Act.

ORIGINATING SUMMONS.

B *Abdul Razak Rouse* for the plaintiffs.
C.I. Robertson for the first defendant.

Cur. Adv. Vult.

Wan Mohamed J.: The Plaintiffs in this case, Datin Hajjah Zaleha bte Mjamal and 3 Others vide Originating Summons No.K.129 of 1981, apply for an order to set aside the Order of the Court dated July 6, 1981 made in *Originating Summons No.K.45 of 1981* in which Perkasa Trading Sdn. Bhd. (Defendant No.1 in O.S. No. K.129/1981) was the Applicant and Taulani Sdn. Bhd. (Defendant No.2 in O.S. No.K.129/1981) was the Respondent together with 2 Others. In order to understand the present case before me I have to give a summary of the case in Originating Summons No.K.45 of 1981.

E The Perkasa Trading Co. applied to the Court for an order declaring the disposal of the piece of land in question by Taulani Sdn. Bhd. to Datin Hajjah Zaleha bte Mujamal and 3 Others (Plaintiffs in O.S. No.K.129 of 1981) to be void *ab initio* and of no effect as provided by section 223 of the Companies Act, 1965, and subsequently for an order that the registration of that transfer be cancelled and also to have the Prohibitory Order lodged by the Applicants registered. Section 223 of the Companies Act, 1965, reads:

G "Any disposition of the property of the company including things in action and any transfer of shares or alteration in the status of the members of the company made after the commencement of the winding-up by the Court shall unless the Court otherwise orders be void."

H The matter to be considered in this application by the Perkasa Trading Sdn. Bhd. is therefore to examine whether the disposal of the land belonging to Taulani Sdn. Bhd. (the transferor) was made after the commencement of the winding-up proceeding. It is found as of fact that the Government of Malaysia presented winding-up petition on Taulani Sdn. Bhd. on June 12, 1978 vide Kota Kinabalu High Court Companies Winding-up Petition No. 4 of 1978. By virtue of Section 219 of the Companies Act, 1965, the date of the commencement of the winding-up of a company is the date of the presentation of the petition for the winding-up. It is therefore clear that the winding-up of the